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NO. 92-62

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ROBERT "C.O." CHINN,

Petitioner,

versus

TERRY A. McFARLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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June 10, 1992

QUESTIONS PRESENTED

1. Whether, following Mireles v. Waco, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991), the action of a justice of the peace in issuing an arrest warrant, pursuant to statutory authority, is a "judicial act" for purposes of the immunity defense.

2. Whether a default has been entered due to the culpable conduct of a public officer-defendant, where that defendant forwarded the summons and complaint to the county Board of Supervisors, and where the county Board notified the defendant that it would not defend the suit only **after** the entry of default.

LIST OF PARTIES TO THE PROCEEDING

Mississippi Justice Court Judge Robert "C.O." Chinn is the Petitioner in this case. Terry A. McFarland is Respondent.

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IN THE SUPREME COURT OF THE UNITED STATES
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Robert "C.O." Chinn hereby requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in McFarland v. Chinn, 954 F.2d 721 (5th Cir. 1992), rehearing denied, March 12, 1992.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit rendered on January 31, 1992, is not reported. It is referenced in a table at 954 F.2d 721. The opinion is reproduced as Appendix "A" to this Petition. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 13, 1992.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), Petitioner, having asserted below, in the Fifth Circuit Court of Appeals, and continuing to assert in this Court the deprivation of rights secured by Federal law and the United States Constitution, as delineated in the Petition for Writ of Certiorari.

The judgment and opinion of the Fifth Circuit was rendered on January 31, 1992. A timely petition for rehearing and suggestion of rehearing en banc was issued on March 13, 1992. Pursuant to Supreme Court Rule 13.1, this Petition is timely filed on or before June 11, 1992.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following statutory provisions of the Mississippi Code of 1972, as amended:

Section 99-15-5 (Supp. 1991):

> Any conservator of the peace may, upon a finding of probable cause, by warrant issued under his hand, cause any person charged on affidavit with having committed, or with being suspected of, any offense against the law, to be arrested and brought before him. . . .

Section 99-15-1:

> The judges of the supreme, circuit, and chancery courts are conservators of the peace throughout the state, and each judge of the county court and every justice of the peace is such within his county.

Miss. Const., Art. 6, Section 171:

> . . . .
>
> All reference in the Mississippi Code to justice of the peace shall mean justice court judge.

STATEMENT OF THE CASE

1. Statement of the Facts.

This case involves the actions of the Petitioner, Mississippi Justice Court Judge Robert "C.O." Chinn, in causing the Respondent, Terry McFarland, to be arrested in the Justice Court offices in Canton, Mississippi. Because this case was resolved on an entry of default, the pertinent facts are taken from the affidavit/warrant of Judge Chinn. The affidavit/warrant was issued by Judge Chinn in his courtroom. Vol. I at 3. The affidavit/warrant is found in Vol. I at 6. On or about 3:30 p.m. on April 6, 1990, McFarland entered into the work area of the Madison County Justice Court Building in Canton. Officer McFarland began to ask questions regarding three tickets in the justice court files. Judge Chinn approached the officer and asked him "Are

there any problems?" McFarland said there were no problems. Judge Chinn asked again, "are there any problems with the tickets?" McFarland answered, "No. Why are you asking questions?" Judge Chinn asked McFarland to leave the work area. McFarland did so, but returned. Judge Chinn asked McFarland to leave twice more. McFarland refused. Judge Chinn then informed McFarland he was in contempt of court and repaired to his courtroom to issue the warrant. At all times pertinent to these facts Judge Chinn believed that he was acting as a judicial officer clothed with judicial immunity. Chinn affidavit, attachment to Motion to Vacate Default Judgment.

A justice court judge is a "conservator of the peace" within his county, Miss. Code Ann. Section 99-15-1 (1972 & 1990 Supp.). A conservator of the peace has the authority to issue arrest warrants, Miss. Code Ann. Section 99-15-5 (1972 & 1990 Supp.). Furthermore, Mississippi justice court judges have the power to punish for contempt of court. Miss. Code Ann. Section 9-11-15 (1972 & 1990 Supp.).

2. Statement of Proceedings.

McFarland filed a Section 1983 lawsuit against Judge Chinn. Vol I at 1. Judge Chinn was served on September 10, 1990. Vol. I at 7. Immediately thereafter he caused a copy of the Complaint to be sent to the attorney for the Board of Supervisors. Vol. I at 22. On October 11, 1990, the insurance carrier for the Board informed Judge Chinn that no coverage was availing under the County's policy. Vol. I at 24. Judge Chinn's attorney then sought to have the Board of Supervisors directly agree to provide a defense for Judge Chinn. Vol. III at 8-9. On October 4, 1990, McFarland's attorney's applied for an entry of default, which was duly docketed by the Clerk. Vol. I at 12. On October 19, 1990, default judgment in the amount of $27,566 and costs was granted. Vol. I at 10. On October 25,

1990, Judge Chinn moved the District Court to vacate the default judgment. Vol. I at 42. This motion was denied, and a timely Notice of Appeal followed. Vol. I at 59. On January 31, 1992, a panel of the Fifth Circuit affirmed, based substantially on the theory that Judge Chinn had failed to demonstrate that he had a meritorious defense to the lawsuit. The Court of Appeals denied rehearing and rehearing en banc on March 13, 1992.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully suggests that this Court should grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in order to resolve the following issues, which present important questions of federal law which has not been, but should be, decided by this Court, and, as to the second question, represents a conflict in the circuits which should be resolved by this Court.

Question One:

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER, AFTER MIRELES v. WACO, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991), THE ACTION OF A JUSTICE OF THE PEACE IN ISSUING AN ARREST WARRANT, PURSUANT TO STATUTORY AUTHORITY, IS A "JUDICIAL ACT" FOR PURPOSES OF THE IMMUNITY DEFENSE.

> Although unfairness and injustice to a litigant may result on occasions, "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself."

Mireles v. Waco, 112 S.Ct. 286, 287, 116 L.Ed.2d 9, 13 (1991) [quoting Bradley v. Fisher, 13 Wall. 335, 347, 20 L.Ed 646 (1872)].

In evaluating the District Court's denial of Judge Chinn's Motion to Vacate Default Judgment, the Court of Appeals panel concluded that "[t]he [district] court erred in finding prejudice," slip op. at 4. In light of this finding, the

panel concluded that "we are bound to examine the final two questions of meritorious defenses and the defendant's culpability." Slip op. at 4-5. Turning to the question of defense, the panel conceded that "Judge Chinn does have statutory authority to issue arrest warrants and punish for contempt of court." Slip op. at 6. However, the Court then noted that the incident leading to the instant suit had not occurred in Judge Chinn's chambers, nor was it the result of an official visit by McFarland to the judge. Id. Purporting to apply the four part test of Ammons v. Baldwin, 705 F.2d 1445, 1447 (5th Cir. 1983), the panel concluded that the circumstances surrounding Judge Chinn's act of holding McFarland in contempt were such that this act was insufficiently judicial to warrant the protection of absolute immunity. Id.

In this the Court of Appeals erred. This Court's recent opinion in Mireles v. Waco, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991), the Court reaffirmed the broad nature of a "judicial act" for purposes of the immunity defense. The Court stated:

> [I]f only the particular act in question were to be scrutinized, then any mistake of a judge in excess of his authority would become a "nonjudicial" act, because an improper or erroneous act cannot be said to be normally performed by a judge. If judicial immunity means anything, it means that a judge "will not be deprived of immunity because the action he took was in error . . . or was in excess of his authority." . . . . Accordingly, as the language in Stump indicates, the relevant inquiry is the "nature" and "function" of the act, not the "act itself."

Mireles, supra, 112 L.Ed.2d at 15 [quoting Stump v. Sparkman, 435 U.S. 349, 362 (1978)] [citations omitted].

Indeed, under Fifth Circuit precedent, the "nature and function" of the issuance of arrest warrants is "judicial" **if** the particular judge had statutory authority to issue the warrant. Thus, in Brewer v. Blackwell, 692 F.2d 387 (5th Cir. 1982), the Court of Appeals distinguished the situation where a Louisiana justice of the peace issued an arrest warrant from that where the justice personally made the arrest. According to the Brewer Court, since Louisiana justices of the peace have statutory authority for the former but not the latter, only the former is protected by the doctrine of judicial immunity. Id. at 397.

Likewise, in Keeton v. Guedry, 544 F.2d 199 (1976), the Fifth Circuit disposed of the immunity question as follows:

> There is no dispute over

> appellee's right to hold his office as Justice of the Peace or over his right to issue warrants for arrests of persons alleged to have committed offenses. Judges are immune from section 1983 liability for their acts within the judicial role.

Id. at 200.

This Court's analysis in Mireles is similar to that of the Court of Appeals in Brewer and Keeton. The Mireles Court considered the California statutes governing the state judiciary to be conclusive proof as to the functions "normally performed by a judge." Mireles, 116 L.Ed.2d at 14-15 & n.2. Put another way, the Court deferred to the will of the state legislature, as demonstrated by the state judicial code, to determine whether the act in question is "judicial," and thus deserving of the protection of immunity.

Thus, the determination of whether Judge Chinn's arrest warrant was a

"judicial act" is narrowed to this question: did Judge Chinn have statutory authority to issue the warrant? The answer is clearly yes. A justice court judge is a "conservator of the peace" within his county, Miss. Code Ann. Section 99-15-1 (1972 & 1990 Supp.). A conservator of the peace has the authority to issue arrest warrants, Miss. Code Ann. Section 99-15-5 (1972 & 1990 Supp.). Furthermore, Mississippi justice court judges have the power to punish for contempt of court. Miss. Code Ann. Section 9-11-15 (1972 & 1990 Supp.).[1]

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[1] The Court of Appeals panel made much of the fact that the Madison County Justice Court acquitted McFarland of the contempt charge. See, e.g., slip op. at 5 (stating that the question of Judge Chinn's authority to issue the warrant was "resolved against him in the state court.") See also slip op. at 6n.3 (contending that the validity of the warrant was "resolved against Judge Chinn" in the state court.)

Since Judge Chinn has statutory authority to issue a warrant for McFarland's arrest, under Mireles the issuance of this warrant was a judicial act deserving of absolute immunity.

The surrounding circumstances of the McFarland arrest support Judge Chinn's defense. The actions for which McFarland was charged with contempt were committed

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The problem with this approach is that nothing in the case of State v. McFarland was "resolved against Judge Chinn." However interested he might have been in its outcome, Judge Chinn was not a **party** to the McFarland case in state court. Furthermore, Judge Chinn and had no right to appeal the dismissal of the contempt charge against McFarland. See Miss. Code Ann. Sec. 99-35-1 (1972 & Supp. 1990) (Limiting appeals to "all cases of **conviction** of a criminal offense . . . by the judgment of a justice court"). It follows that Judge Chinn had no full and fair opportunity to litigate the issues herein in the state court proceedings against McFarland. Therefore, there can be no collateral estoppel, implied or otherwise, against Judge Chinn. United States v. Jensen, 608 F.2d 1349, 1355 (10th Cir. 1979).

in the building housing the justice court and involved McFarland's use of original records in justice court actions. Chinn affidavit, Vol. I at 6. Furthermore, the Complaint alleges that the arrest warrant was sworn in Judge Chinn's courtroom. Vol I at 3. It cannot be said that Judge Chinn did not have a meritorious defense to the Complaint.

In summary, the Court of Appeals' analysis of this factor should have come to a close upon finding that Judge Chinn had statutory authority to issue the arrest warrant. McFarland's acquittal of the charge on which he was arrested does not change this fact. Indeed, to allow the acquittal to carry such weight does great damage to the values underpinning judicial immunity. To the contrary, the grant of authority to issue warrants from the Mississippi Legislature is the final

word on whether the issuance of a warrant in a particular case is an act is "one judges ordinarily perform," Mireles, supra, 116 L.Ed.2d at 15; Brewer, supra, 692 F.2d at 397.

This Court should grant certiorari, and summarily reverse the judgement of the Court of Appeals, to reinforce the teachings of Mireles over against the dilution of the judicial immunity defense represented by the opinion in this case.

Question Two:

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A DEFAULT HAS BEEN ENTERED DUE TO THE CULPABLE CONDUCT OF A PUBLIC OFFICER-DEFENDANT, WHERE THAT DEFENDANT FORWARDED THE SUMMONS AND COMPLAINT TO THE COUNTY BOARD OF SUPERVISORS, AND WHERE THE COUNTY BOARD NOTIFIED THE DEFENDANT THAT IT WOULD NOT DEFEND THE SUIT ONLY AFTER THE ENTRY OF DEFAULT.

The entry of default in this case was made on October 4, 1990 (Vol. I at 12), three days after the deadline for filing an answer had elapsed.[2] Judge Chinn reasonably believed and expected that the Board of Supervisors of Madison County would defend this lawsuit and therefore caused the Complaint to be forwarded to the Board for review. Vol. I at 22. Entry of default was made on **October 4, 1990.** On **October 11**, the insurance

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[2] Service of process on Judge Chinn was had on September 10, 1990. Vol. I at 7. Since the twentieth day after such service was Sunday, September 30, the answer was due Monday, October 1, 1990. F.R.C.P. 6(a).

carrier for the Board informed Judge Chinn that no coverage was availing under the County's policy.[3] Vol. I at 24. Judge Chinn's personal attorney then sought to have the Board of Supervisors directly agree to provide a defense for Judge Chinn. Vol. III at 8-9. On October 19, 1990, default judgment in the amount of $27,566 and costs was entered. Vol. I at 19. The judgment recites that Judge Chinn had been given no notice of the entry of default or of the pendency of proceedings

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[3] These dates are significant inasmuch as the Court of Appeals overlooked the date of the entry of default. In the Fifth Circuit's view, Judge Chinn was culpable for the default because the letter from the Board's carrier came before the actual default judgment. However, the entry of default had already occurred at the time Judge Chinn received the letter, and no notice was given between entry of default and default judgment. The damage, in short, was already suffered by the time Judge Chinn discovered that he would have to provide his own defense.

to assess damages. Id.

The record is clear that Judge Chinn's failure to file an answer on October 1 was not wilful. Cf. United States v. One Parcel of Real Property, 763 F.2d 181, 183 (5th Cir. 1985). Where a defendant's untimely filing is not willful, and the defendant moves with all possible speed to remedy the default, the defendant's minimal tardiness is not sufficiently culpable to justify depriving the defendant of the right to present a substantive defense. Hibernia National Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277, 1280 (5th Cir. 1985). See also Walter E. Heller Western, Inc. v. Seaport Enterprises, Inc., 99 F.R.D. 36 (D.Or. 1983).

> [T]o be treated as culpable, the conduct of a defendant must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on these proceedings .
> . . . where the party in default satisfies the first two requirements for relief and moves promptly to set aside the default before a judgment is entered, the district court should grant the motion if the party offers a credible explanation for the delay that does not exhibit disregard for the judicial proceedings.

INVST Financial Group, Inc., v. Chem-Nuclear Systems, Inc., 815 F.2d 391, 399 (6th Cir. 1987). Or, as the Third Circuit has put it,

> Between the extremes of repeated contumacious conduct and innocent procedural error are the manifold instances of neglect and inadvertence that require trial courts to weigh the equities of the situation and the need for the efficacious resolution of controversies.

Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir. 1984).

The need to grapple with the circumstances of the default is

particularly acute in this case. Judge Chinn is a public official of the State of Mississippi. Like many such officials, he does not have the means to provide for a defense out of his own "pocket." It is natural, even advisable, for such an official to seek assistance from the official body charged with defending him, to wit, the Board of Supervisors. The record is clear that Judge Chinn was attempting to do just that when the plaintiff rung down the curtain on him. One may not endorse Judge Chinn's actions (or inactions), but the fact remains that he was attempting to set up a defense to the complaint in an arguably diligent manner. His failure to file a responsive pleading in the meantime may not have been commendable, but it was certainly not willful.

For these reasons, this Court should

grant certiorari to establish that where a public official takes steps to be defended by the State, the official is not necessarily responsible for the entry of default entered during the pendency of such an effort. Here, where the default was entered three days after the answer was due, and where the defendant sought to set the default aside within a week of notice of its entry, the equities tip overwhelmingly in favor of setting the default aside.

CONCLUSION.

Wherefore, premises considered, Judge Chinn respectfully requests that this Court grant the writ of certiorari, and reverse the judgment of the Court of Appeals.

Dated: June 10, 1992.

Respectfully Submitted,

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APPENDIX "A": FIFTH CIRCUIT OPINION

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1510
Summary Calendar

TERRY A. McFARLAND,

Plaintiff-Appellee,

versus

ROBERT "C.O." CHINN, JR.,

Defendant-Appellant.

Appeal from the United States
District Court for the
Southern District of Mississippi
(CA-J90-0448(W))

January 31, 1992.

Before JONES, DUHE, and WIENER, Circuit Judges.

EDITH H. JONES, Judge:[1]

Appellee Terry McFarland is a sergeant of the Mississippi Highway Safety Patrol, assigned to the Madison County area. Appellant Robert Chinn is an elected justice of the peace in the same county. McFarland sued Chinn under 42 U.S.C. Section 1983 after Chinn ordered McFarland's arrest for contempt of court. Chinn failed to reply to the complaint and summons and the district court entered a default judgment. Invoking Federal Rule of Civil Procedure 60(b), Chinn unsuccessfully sought to vacate the judgment, and appeals from denial of that

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

motion. We affirm the trial court.

FACTS

On April 6, 1990, in pursuit of his official duties, Sergeant McFarland went to the Madison County Justice Court Clerk's Office to check the status of several traffic violation citations. As Sergeant McFarland conducted his business with a deputy clerk, Judge Chinn interrupted the clerk and asked what she was doing. When she told Judge Chinn that she was assisting Sergeant McFarland with some citations, Judge Chinn turned to Sergeant McFarland and asked him if there was some problem with the tickets. Although Sergeant McFarland appeared to be in the proper pursuit of his lawful duties as a highway patrol officer, Judge Chinn ordered Sergeant McFarland to leave the building under the threat of a contempt citation. Judge Chinn's motivation for

doing so is unclear from the record.

Sergeant McFarland later returned to the Clerk's office and was seen by Judge Chinn. Judge Chinn called a deputy clerk into his office, swore an affidavit, and ordered local law enforcement officials to seize Sergeant McFarland and incarcerate him on contempt charges. Two officers placed Sergeant McFarland under arrest. Although Sergeant McFarland offered no resistance, the officers held him by both arms and paraded him through the court facility and the town square as they transported him to the county jail. Sergeant McFarland was booked into the jail and detained until he was able to raise bail.

In subsequent trial in the Madison County Justice Court the court found that the incident leading to the contempt citation did not occur in a judicial forum

and thus there was no legal basis for the citation. The charge was then dismissed. Sergeant McFarland filed suit in federal district court and Judge Chinn was served on September 10, 1990. The summons personally served on Judge Chinn bore the notice that a default judgement could be entered if he failed to answer within twenty days. Judge Chinn engaged legal counsel who then petitioned the county board of supervisors to defend the action.

On October 11, the county's insures notified Judge Chinn that his alleged actions were outside the scope of insurance policy and they denied coverage. Eight days later, on October 19, the district court entered a default judgment against Judge Chinn. On October 25, Judge Chinn filed a motion to vacate the

judgment, which was denied by the court.[2]

RULE 60(b) MOTION

The trial court enjoys considerable discretion to grant or deny a motion brought under Federal Rules of Civil Procedure Rule 60(b). Teal v. Eagle Fleet Inc., 933 F.2d 341, 347 (5th Cir. 1991). We reverse the trial court's denial of a Rule 60(b) motion only in the narrow circumstance when denial was "so unwarranted as to constitute an abuse of discretion." Seven Elves, 635 F.2d at 402. Although the trial court is liberally endowed with such discretion, we have suggested three factors to guide the trial court's determination of a Rule 60(b) motion. First, the court should

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[2] Judge Chinn asked to have the judgment set aside under Rules 55 and 60. Rule 60(b), Fed.R.Civ.P., controls where a party seeks to set aside a default judgment. Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. 1981).

consider the extent of prejudice to the plaintiff; second, the court must examine the merits of the defendant's asserted defenses; and, third, the court should evaluate the defendant's culpability. Hibernia Nat'l Bank v. Administracion Cent. Soc. Anonima, 776 F.2d 1277 (5th Cir. 1985). Both the trial court's decision and our review are informed by these considerations.

A. Prejudice to Sergeant McFarland

The district court found that Sergeant McFarland would be prejudiced by setting aside the default judgment because he had undertaken the expense of producing witnesses for a hearing on damages and made the necessary filings for a default judgment. In Hibernia Nat'l Bank the Court stated that the mere possibility of prejudice would not satisfy this test. 776 F.2d at 1280. The court erred in

finding prejudice. The incurring of additional expenses should be included in contemplation of a Rule 60(b) motion; however, where alternative remedies are available, i.e., assessment of costs or imposition of sanctions, the minor inconvenience of recalling readily accessible witnesses normally will not suffice to establish prejudice to the plaintiff. Our inquiry cannot end with a facile conclusion; we are bound to examine the final two questions of meritorious defenses and the defendant's culpability. If Rule 60(b) motion fails at either remaining juncture we must affirm the trial court. Hibernia Nat'l Bank, 776 F.2d at 1280.

B. Asserted Defenses

As an elected justice of the peace, Judge Chinn contends he is entitled to full judicial immunity. It is axiomatic, and has been so since the founding of this nation, that judges are generally immune from suit for money damages. Mireles v. Waco, ____ U.S. ____, 112 S.Ct. 286, 287 (1991); Bradley v. Fisher, 13 Wall. 335, 347 (1872). Although this fact was resolved against him in the state court, Judge Chinn asserts that his actions were within the scope of power and authority granted him by Mississippi law. The United States Supreme Court has consistently focused not on the judicial office, scrutinizing rather the function performed by the judge and giving genesis to the lawsuit. Immunity is unquestionably extended to acts of a judicial character. Supreme Court of

Virginia v. Consumers Union of United States, Inc., 446 U.S. 719, 731 (1980). Conversely, rulemaking, see id., and administrative personnel actions are not protected by the armor of judicial immunity. Forrester v. White, ____ U.S. ____, 108 S.Ct. 538, 545 (1988). Absolute judicial immunity is "strong medicine" suitable for prescription only to remedy the ills of vexatious and collateral attacks which threaten the integrity of the adjudicative function. See id., citing Forrester v. White, 792 F.2d 647, 660 (7th Cir. 1986) (Posner, J., dissenting), rev'd, ____ U.S. ____, 108 S.Ct. 538, 545 (1988).

Equally well-settled is that judicial immunity does not attach when acts are committed in a non-judicial role or taken in clear absence of jurisdiction. Brewer v. Blackwell, 692 F.2d 387, 396 (5th Cir.

1982). We consider four factors in evaluating the claimed judicial character of an act. First, whether the act in question is normally considered a judicial act; second, whether it occurred within the judge's courtroom or chambers; third, whether the act or dispute involved a matter pending before the judge; and fourth, whether the dispute arose "directly and immediately out of a visit to the judge in his official capacity." Ammons v. Baldwin, 705 F.2d 1445, 1447 (5th Cir. 1983), cert. denied, 465 U.S. 1006 (1984) (citations omitted).

The trial court found that Judge Chinn's claimed judicial immunity defense was not meritorious. Judge Chinn does have statutory authority to issue arrest

warrants and punish for contempt of court.[3] The incident leading to the instant suit did not occur in Judge Chinn's chambers or courtroom -- Sergeant McFarland had no business before Judge Chinn and did not seek him out. Therefore we find no error in the trial court's conclusion that Judge Chinn's judicial immunity defense was without merit.

C. Culpability

The trial court found sufficient culpability on Judge Chinn's part to refuse to set aside the default judgment. Judge Chinn asserts that he fully expected the county government to bear the burden of his defense, and was not notified of

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[3] That authority is arguably circumscribed into a requirement that the arrest warrant be facially valid, a circumstance which the state court resolved against Judge Chinn. Nonetheless, because Judge Chinn's defense fails on multiple alternative grounds we do not decide this issue.

their refusal until after the default judgment was entered against him. This argument fails on two fronts. The letter from the county's legal counsel indicating that the insurer denied coverage, filed with the Rule 60(b) motion, was received by Judge Chinn's counsel on October 10, 1990. Although the default judgment had been noticed in open court, the final order of default did not follow until more than one week after Judge Chinn's counsel learned that the county would not defend Judge Chinn. Ample time passed for Judge Chinn's counsel to request an extension of time to prepare an answer.

Judge Chinn also contends that he should not be held responsible for failure to respond because he has no formal legal education. He asserts that he has had no higher education, and is not required to be law-trained as an elected justice of

the peace. He further claims that it is not the custom in his court to require a formal written response from civil litigants; mere appearance in court is a sufficient answer to a complaint. Although Judge Chinn may not have had the benefit of higher education, and his court may operate in a relaxed fashion, the complaint personally served on him plainly bore the legend stating that a default judgement "will be taken against you" if he failed to answer within twenty days.

Counsel for Judge Chinn urges that the default judgment should be set aside because counsel "inadvertently" failed to request an extension of time to answer. We have previously held that the negligence or carelessness of a party's attorney is not sufficient cause to grant a Rule 60(b) motion, indeed suggesting that it would be an abuse of the trial

court's discretion to do so. Lavespere v. Niagra Mach. & Tool Works, Inc., 910 F.2d 167, 173 (5th Cir. 1990). We cannot now say that the trial court abused its discretion in refusing to set aside the judgment on the grounds that Judge Chinn was culpable in failing to respond within the established time.

Finally, Judge Chinn relies on the general view in the federal judicial system that a trial on the merits is preferred over summary disposition. Amberg v. Federal Deposit Ins. Corp., 934 F.2d 681, 686 (5th Cir. 1991). Our review of the record and pleadings shows that Judge Chinn has raised only the defense of judicial immunity.[4] The inadequacy of that defense had been authoritatively

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[4] Judge Chinn has not briefed any discussion of qualified immunity. See Husband v. Bryan, 946 F.2d 27 (5th Cir. 1991).

determined by the trial court and affirmed by our review. A trial on the merits would serve no purpose.

CONCLUSION

The trial court holds considerable discretion in denying a Rule 60(b) motion to vacate a default judgment. We agree that the defense of judicial immunity is without merit in this instance and that Judge Chinn is culpable in failing to respond to the complaint. We find no abuse of discretion and affirm the decision of the trial court. **AFFIRMED.**

APPENDIX "B": DENIAL OF REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1510

TERRY A. McFARLAND,

Plaintiff-Appellee,

versus

ROBERT "C.O." CHINN, JR.,

Defendant-Appellant.

Appeal from the United States
District Court for the
Southern District of Mississippi
(CA-J90-0448(W))

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 1-31-92, 5 Cir. 198__, ___ F.2d ____)

(March 12, 1992)

Before JONES, DUHE, and WIENER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

3/13/92

/s/ Edith H. Jones
United States Circuit Judge

Supreme Court, U.S.
FILED
MAY 16 1992
OFFICE OF THE CLERK

(2)

NO. 9262

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ROBERT "C.O." CHINN,

Petitioner

versus

TERRY A. McFARLAND,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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July 15, 1992

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Fifth Circuit Court of Appeals decision is in conflict with Mireles v. Waco; _____ U.S. _____, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991).

LIST OF PARTIES TO PROCEEDING

Robert "C.O." Chinn is the Petitioner.

Terry A. McFarland is Respondent.

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STATEMENT OF THE CASE

Statement of the Facts

Respondent, Terry A. McFarland, is presently employed as a Sergeant in the Mississippi Highway Safety Patrol, a law enforcement agency of the State of Mississippi. At all times relevant to this controversy, McFarland was acting in his capacity as a duly sworn officer of the Mississippi Highway Safety Patrol (Vol. I, Page 2). Petitioner, Robert "C.O." Chinn, is a duly elected Justice Court Judge of Madison County, Mississippi.

On or about Friday, April 6, 1990, at approximately 3:00 o'clock p.m., Terry McFarland, while acting in his official capacity as an officer with Mississippi Highway Safety Patrol (MHSP), was present in the Clerk's office of the Madison County Justice Court building to check the status

of several traffic tickets involving a juvenile offender, when Judge Chinn came up and questioned the Clerk as to what she was doing. The Clerk replied that she was checking the drivers license history for Officer McFarland and asked if there were any problems with the tickets. After some conversation, Judge Chinn ordered Officer McFarland to leave the building, but he refused. He was then advised that if he did not leave as ordered, he would be charged with contempt of court and arrested. (Vol. I, Pages 3, 54-55).

Officer McFarland left and went outside the building for a short time. He later returned and was in a public area when Judge Chinn asked a clerk to follow him into the courtroom where he dictated and signed a combination affidavit/warrant for the arrest

of Officer McFarland for contempt of court. (Vol. I, Page 55).

At the time Judge Chinn dictated and signed a combination affidavit/warrant for the arrest of Officer McFarland, McFarland had no case then pending before the court and court was not properly convened or in session at the time. The earlier discussion between Judge Chinn and McFarland occurred in the Clerk's office, not in the courtroom. (Vol. I, Page 55).

Officer McFarland was placed under arrest, escorted from the building by law enforcement officers, and transported to the Madison County Jail where he was booked into the jail docket on a charge of contempt of court. Subsequent to his being taken to the Madison County Jail, McFarland posted a bond and was released on his own recognizance. (Vol. I, Page 4).

On April 11, 1990, Judge Nancy Isonhood, after hearing evidence on the criminal contempt charge against Officer McFarland, dismissed the charges, ruling that the incident in question did not occur in a judicial forum. (Vol. I, Page 52).

Section 45-3-21 Mississippi Code Annotated (Supp. 1990), gives Mississippi Highway Safety Patrolmen, such as McFarland, the powers and imposes upon them a duty to enforce all traffic laws, rules and regulations of the State of Mississippi upon all highways of the State Highway Systems and the right-of-ways of such highways.

Whenever any patrolmen shall prefer any traffic charge whatsoever against any person in any court, Section 45-3-25 Mississippi Code Annotated (1972), as amended, imposes a duty upon such a patrolman, to mail two copies of the abstract of the court record

immediately to the Commissioner of Public Safety at Jackson, Mississippi, upon the termination of such proceeding, showing the nature of the charge preferred, the date of the trial upon such charge, the disposition of the matter by the court, and the sentence, if any, imposed by the court.

Mississippi Justice Court Judges, pursuant to Mississippi Code Ann. Section 9-11-15 (1990 Supp.), are required to hold regular terms of court, at such times as they may appoint, not exceeding two and not less than one term each month, at the appropriate Justice Court courtroom established by the County Board of Supervisors (the governing body of the County); and they may continue to hold court from day to day so long as business may require. All process shall be returnable, and all trials shall take place at such

regular terms, except as otherwise provided. Where the defendant is a non-resident or transient person, it shall be lawful for the Judge to have the parties brought before him at any reasonable time and hear the evidence and give judgment, where it shall be shown by the oath of either party that a delay of the trial until the regular term will be of material injury to him. Such a court shall be a court of record, with all power incident to a court of record, including the power to impose fine and imprisonment in such amount or length as is authorized by law.

Question One

CERTIORARI SHOULD BE DENIED AS THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS OR WITH APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT.

Petitioner, Robert "C.O." Chinn requests this Court to grant certiorari to determine whether his actions, while claiming to act in his capacity as a Justice of the Peace in issuing an arrest warrant, is a "judicial act" for purposes of his immunity defense.

While Petitioner failed to cite or argue Mireles v. Waco, _____ U.S. _____, 112 S.Ct. 286, 116 L.Ed.2d 9(1991) in his original brief filed with the Fifth Circuit, he now contends that the Court of Appeals panel, which cited Mireles in its opinion, erred in concluding that his act of holding McFarland for contempt of court was

insufficiently judicial to warrant the protection of absolute immunity.

This Court in Mireles set out two sets of circumstances where judicial immunity is overcome.

> First, a Judge is not immune from liability from non-judicial actions, i.e., actions not taken in the Judge's judicial capacity. Second, a Judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction.

112 S.Ct. 288 [quoting Forrester v. White, 484 U.S. at 227-229, 108 S.Ct. at 544-545, 98 L.Ed.2d 555(1988); Stump v. Sparkman, 435 U.S. at 360, 98 S.Ct. at 1106, 55 L.Ed.2d 331(1978); Bradley v. Fisher, 13 Wall. at 351] In determining whether the act is a judicial one for the purposes of immunity, this Court stated:

> Whether an act by a Judge is a 'judicial' one relate[s] to the nature of the act itself, i.e. whether it is a function normally

> performed by a Judge, and to the expectations of the parties, i.e. whether they dealt with the Judge in his judicial capacity.

112 S.Ct. at 228, citing Stump v. Sparkman, 435 U.S., at 362, 98 S.Ct. at 1108, 55 L.Ed.2d 331(1978); Forrester v. White, 484 U.S., at 227-229, 108 S.Ct., at 544-545, 98 L.Ed.2d 555(1988). (Emphasis Added)

This Court, in Mireles, found that Judge Mireles' actions, even if he acted in excess of his authority, were taken in the aid of his jurisdiction over a matter before him and could not be said to have been taken in the absence of jurisdiction. 112 S.Ct. at 289. In the case, sub judice, Judge Chinn undeniably had statutory authority to issue an arrest warrant and to punish for contempt of court, if such act was committed in a judicial role or taken in the aid of his jurisdiction over a matter before him.

However, as the Court of Appeals panel correctly pointed out, the incident leading to Sergeant McFarland's arrest did not occur in Judge Chinn's chambers or courtroom and Sergeant McFarland was in the Clerk's office carrying out his normal duties. The incident did not arise from a visit to the Judge, as Sergeant McFarland had no business before Judge Chinn and did not seek him out. (Slip op. at page 6.) These facts, which the panel considered, clearly reflect that McFarland did not come to the Justice Court building to deal with or see Judge Chinn in his judicial capacity.

Unlike Judge Mireles, Judge Chinn was not acting in the aid of his jurisdiction over a matter before him and the Court of Appeals in applying these facts, correctly found that Judge Chinn's judicial immunity defense was without merit.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent, Terry McFarland, respectfully requests that this Court deny Petitioner's Writ of Certiorari, and affirm the Judgment of the Court of Appeals.

Dated this 15th day of July, 1992.

Respectfully submitted,

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Counsel of record for Respondent

CERTIFICATE OF SERVICE

I, James H. Herring, Attorney for Respondent, do hereby certify that I have this day mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief for Respondent to James W. Craig, Esq., 206 W. Pearl Street, Suite 808, Jackson, MS 39201; and to Isaac K. Byrd, Jr., Esq., 427 E. Fortification, Jackson, MS 39202.

SO CERTIFIED this the 16 day of July, 1992.

JAMES H. HERRING